No. 3076

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN MANGANESE STEEL COMPANY
(a corporation),

Appellant,

vs.

ALASKA MINES CORPORATION
(a corporation), et al.,

Appellees.

BRIEF FOR APPELLANT

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PERNAU-WALSH PRINTING CO.

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Statement of the Case.

This is a creditor's suit brought by the plaintiff (appellant herein), a judgment creditor of the defendant, Nome Consolidated Dredging Company (one of the appellees herein), to set aside a decree of the above entitled court of foreclosure of two deeds of trust or mortgages by the said Nome Consolidated Dredging Company and the sales thereunder, and transfers thereafter made, and to declare subject to the equitable lien of the appellant the property and assets of the said Nome Consolidated

Dredging Company now in the possession and control of the defendant, Alaska Mines Corporation (also an appellee herein); said assets being described in detail in the decree, a copy of which is annexed to the complaint (Tr. pp. 27, 28, 29, 30 and 31).

Appellant in its complaint (Tr. p. 2), alleges that the appellee, Nome Consolidated Dredging Company, was at and prior to the 14th day of September, 1914, indebted to appellant in the sum of $25,000 with interest thereon, for machinery, steel and dredging equipment theretofore delivered to and used by it in its mining operations in the Nome mining district, District of Alaska, which said indebtedness was evidenced by certain promissory notes, executed by said appellee and endorsed to the appellant, and that on the 14th day of September, 1914, an action was pending in the Court of the Common Pleas for the City and County of Philadelphia, State of Pennsylvania, for the recovery of amount due on said promissory notes which were then long past due and unpaid; that such proceedings were had in said action in Pennsylvania, that on the 8th day of June, 1916, a judgment was recovered by the appellant against the said appellee for the sum of $30,920 with interest and costs; that thereafter the appellant brought a law action in the District Court for the District of Alaska, Second Division, based on said judgment against said appellee and therein recovered judgment against said

appellee in the said sum of $30,920 with interest and costs and thereafter caused an execution to be issued therein which was subsequently returned nulla bona by the United States Marshal, and that the said judgment now remains unpaid and unsatisfied, and that the said judgment debtor, Nome Consolidated Dredging Company, is wholly insolvent by reason of the acts and things in said complaint thereafter recited.

That on the 14th day of September, 1914, while said appellee was so indebted to the appellant, the said appellee acting by and through E. E. Powell (also an appellee herein), while acting as vice-president and general manager, made, executed and delivered to one F. H. Thatcher, trustee (also an appellee herein), a certain trust deed or mortgage referred to as the Thatcher mortgage, conveying to him all its real and personal property to secure an issue of promissory notes aggregating a sum of $25,000, which said notes consisted of a series of 37 notes, some of which purported to be delivered to the Alaska Banking & Safe Deposit Company, a corporation of Nome, Alaska, of which corporation said Thatcher was manager and principal officer, and others of said notes to the mortgagor, and to M. W. Newton, Louis H. Eisenlohr, and E. L. Webster, all officers and directors of the mortgagor, Nome Consolidated Dredging Company; and that the said Alaska Banking & Safe Deposit Company was paid in full by said E. E. Powell as general

manager of the appellee, Nome Consolidated Dredging Company, long prior to the commencement of foreclosure proceedings hereinafter mentioned.

That on the 16th day of September, 1914, and only two days after said Thatcher mortgage was executed and delivered, the said appellee, Nome Consolidated Dredging Company, again acting by and through said appellee, E. E. Powell, its vice-president and general manager, with intent to defraud its creditors and particularly the appellant, who was then litigating its claim in the court of Pennsylvania, and with the further intent to prefer certain of its officers and agents and stockholders as preferred creditors as against the appellant, made, executed and delivered to one J. M. Sloan (also an appellee herein), as trustee, its certain trust deed or mortgage herein referred to as the Sloan mortgage, conveying all the real and personal property of every nature whatsoever belonging to said appellee, Nome Consolidated Dredging Company, to the said J. M. Sloan as trustee, as security for the payment of a series of alleged promissory notes aggregating the sum of $200,000.00, which said alleged promissory notes were issued in a series from 1 to 70, consecutively; that the said notes, secured by the said Sloan mortgage, were by the trustee pretended and alleged to be delivered as follows: four notes to the appellee, Louis H. Eisenlohr, an officer and stockholder of the Nome Consolidated Dredging Company; 14 of said notes aggregating the sum of $57,-

603.52 were pretended and alleged to be delivered to the appellee, M. W. Newton, the president and stockholder of said mortgagor; the remainder of said promissory notes aggregating the sum of $129,-345.63 were pretended and alleged to be delivered to the Alaska Dredging Company (also an appellee herein), said Alaska Dredging Company being officered and controlled by the said appellee, E. E. Powell; that in truth and in fact, none of said notes were ever delivered, but at all times were spurious and worthless and were held and kept in the possession of said appellee, E. E. Powell, to further the plans, schemes and conspiracy to defraud the appellant.

That prior to the month of September, 1914, the appellee, E. E. Powell, entered into a plan, scheme and conspiracy with the appellees, M. W. Newton, Louis H. Eisenlohr, E. L. Webster, George D. Schofield, the Alaska Dredging Company and others unknown to the appellant, whereby it was understood and agreed between them, that the said Thatcher mortgage and the said Sloan mortgage should be executed and recorded and thereafter foreclosure proceedings instituted and thereby all of the assets, real and personal, of the appellee, Nome Consolidated Dredging Company, sold so as to preclude any creditors and particularly the appellant from recovering, and to shut out all stockholders, save and except the favored few who were to participate in the results of said scheme and conspiracy; that at said time it was further agreed and understood

that said Powell should act as the trustee of all of said persons so scheming and conspiring and that said Powell should thereafter begin foreclosure proceedings in the District Court and at a subsequent sale bid in all the assets of the said appellant, Nome Consolidated Dredging Company, as trustee for such persons and that thereafter they were to organize a new company or corporation to take over the title by bill of sale and deed from said Powell as trustee and operate the dredges, machines and mines of the said appellant, Nome Consolidated Dredging Company, and participate in the ownership of the stock and management of such corporation when so organized.

That at the time of the making of the said Thatcher mortgage and the said Sloan mortgage in September, 1914, the said appellee, Nome Consolidated Dredging Company, was wholly insolvent and was unable to pay its just debts and liabilities; that said Powell, while acting as vice-president and general manager of the appellee, Nome Consolidated Dredging Company, then and there planned, schemed and conspired with said Newton, Eisenlohr, Webster and the Alaska Dredging Company to fraudulently prefer each of them to other creditors of the said Nome Consolidated Dredging Company and particularly as against the appellant; that in pursuance of said plan, scheme and conspiracy, said Powell caused said Thatcher mortgage and said Sloan mortgage to be made, executed, delivered and recorded, thereby intending to cover all real and personal property

belonging to the Nome Consolidated Dredging Company with liens to prevent this appellant, an unsecured creditor, from recovering its just claim from the assets of said debtor company.

That thereafter pursuant to said scheme, the said Powell, on the 24th day of June, 1915, in the name of said Thatcher, as trustee and in his own name as trustee, and individually, and in the name of others as plaintiffs, brought suit in the District Court for the District of Alaska, against the said appellee, Nome Consolidated Dredging Company and C. E. Darling, trustee (also an appellee herein), who had been substituted prior thereto as trustee for said J. M. Sloan in said Sloan mortgage; that immediately after said suit was commenced by said Powell, he thereupon as general manager of said Nome Consolidated Dredging Company, employed an attorney who appeared and filed an answer in said cause, and said Powell also employed an attorney to represent said C. E. Darling, trustee, and caused said attorney to appear and file a cross-complaint and answer in said suit; that thereupon said Powell, acting for all the parties and directing the proceedings for the plaintiffs, the defendants and the cross-complainants in said suit in conformity with his scheme, plan and conspiracy to defraud the creditors of the said Nome Consolidated Dredging Company and particularly this appellant, caused his various counsel and attorneys to stipulate the said cause for trial immediately so that the said foreclosure suit was brought on for trial before the said court within seven days

from the date it was commenced, to-wit: on the first day of July, 1915. Thereupon said Powell had entered without objection, a decree of foreclosure prepared by his personal attorney, a copy of which decree is annexed to the said complaint (Tr. p. 19), which said decree by its terms ordered and directed a sale of all of the property, real and personal, of the said Nome Consolidated Dredging Company to satisfy the amounts alleged to be due on the several series of notes mentioned in both of said mortgages, and as part and parcel of said scheme and conspiracy, said Powell caused his said attorneys to prepare said decree so that said spurious and worthless notes could be used by him in bidding in said assets at the Marshal's sale, thereby preventing any bona fide bidders from bidding at said sale; that immediately thereafter said property was sold on execution in said cause by the United States Marshal for the Second Division, Territory of Alaska, and said Powell in conformity with his said scheme and conspiracy bid in all the personal property of said Nome Consolidated Dredging Company for the sum of $20,000 and all its realty for the sum of $3,000 as shown by the Marshal's return, copy of which is annexed to the said complaint (Tr. p. 31); that at said sales appeared several bona fide purchasers able and willing to bid on said property for cash, but it was impossible for them to compete with said Powell who was using said spurious and worthless notes under the terms of said decree in paying for his bids made at said sales; that said Powell purchased all of

said assets of the said Nome Consolidated Dredging Company as trustee for himself and his other officers and conspirators and took title at said sales from the said Marshal as said trustee for the use and benefit of the same, with intent to hinder, delay and defraud the appellant, and other creditors and stockholders who were not in on said scheme, so planned and carried out by said Powell.

That thereafter, the said Powell caused a concern to be organized in conformity with such scheme, called the Nome Holding Company, and attempted to carry out the said scheme; that thereafter, said Newton, Eisenlohr, Webster, the Alaska Dredging Company, said Powell and others, in conformity with said plan and scheme, organized the said appellee, Alaska Mines Corporation, with full knowledge on the part of all concerned of the fraud perpetrated upon the appellant and other creditors of the said Nome Consolidated Dredging Company and its innocent stockholders, transferred all of said assets, both real and personal described in said decree above set forth, to said newly organized concern and to the said Alaska Mines Corporation; and the said Alaska Mines Corporation thereupon took possession of all of said assets and claims to be the owner and holder thereof, and entitled to the possession; that all the stock of the said Nome Holding Company and Alaska Mines Corporation was subscribed and divided between said schemers and conspirators, who proceeded to elect themselves and employees as directors and officers of said concern, to manage and

control the said dredges, machines, and mines, mentioned and described in said decree; that on the 8th day of October, 1915, said Powell, still acting as agent, manager and vice-president of said Nome Consolidated Dredging Company and long after he had bid in said assets, real and personal, and while he was operating the same as such trustee, made a written statement under oath and filed or caused it to be filed with the clerk of the above entitled court, a copy of which (Tr. p. 37), is attached to the said complaint and marked, Exhibit "C," wherein the said Powell swore that on the 30th day of June, 1915, being the day before said foreclosure trial of said Thatcher and Sloan mortgages, that the said assets of the said Nome Consolidated Dredging Company were far in excess of all its debts and liabilities and of the total value of $670,906.31, but that said Powell conspired and conducted said foreclosure proceedings in such way and manner by the use of said spurious and worthless notes and otherwise so that all of said assets were confiscated by him and subsequently assigned and transferred to the appellee, Alaska Mines Corporation, in fraud of the rights of the appellant, who was then a creditor of said Nome Consolidated Dredging Company.

That said Powell as trustee for the conspirators, immediately after said sales, took possession of all of said assets and operated the dredges and mines during the remainder of the season of 1915 and he and his co-conspirators and schemers refused to longer recognize the Nome Consolidated Dredging

Company as the owner of said assets, and for his own use and the use of his co-conspirators kept and retained the proceeds of the said mining operations for the year 1915; that said conspirators, acting with others, organized the Alaska Mines Corporation during the year 1916 with full knowledge and notice of the rights of the appellant as a creditor of said appellee, Nome Consolidated Dredging Company; that said Alaska Mines Corporation took title by bill of sale and deed, to said assets and entered into the possession of the personal and real property, consisting of mines, dredges, machinery, mining claims and other equipment, and began to use the same in conducting mining operations with full knowledge and notice of the fraud perpetrated.

That the said mining claims described in the decree are valuable only for the gold therein contained and when the said gold is mined therefrom will be rendered worthless; that said machinery and equipment is being used by the appellee, Alaska Mines Corporation, and by reason thereof, is being worn and depreciated and in time will be rendered valueless; that said Alaska Mines Corporation claims to be the owner of the said assets and threatens to dispose of the same for their own use and benefit, refusing at all times, to recognize any right, title or interest therein of the Nome Consolidated Dredging Company.

That the appellant, a judgment creditor of said Nome Consolidated Dredging Company, has ex-

hausted all its legal remedies against the Nome Consolidated Dredging Company and is unable to collect its judgment or any part thereof, by legal process; that appellant has no other remedy, other than this equitable cause to subject the said assets to the payment of its claims, and in order to preserve and protect the said property, pendente lite, it is necessary for the court to appoint a receiver to take possession of all of the said assets, real and personal, and preserve the same for distribution.

The appellee, Alaska Mines Corporation, subsequently filed its answer (Tr. p. 143), wherein the said appellee denies, generally, the allegations of the appellant's complaint, except that it admits the execution of the said Thatcher and Sloan mortgages and the subsequent foreclosure thereof, together with the sales made thereunder, and claims that it is now in the sole and exclusive possession of the property and claims such ownership and right of possession as a bona fide purchaser for value.

Default for want of appearance and answer was entered against the appellant, Nome Consolidated Dredging Company, and C. E. Darling, trustee (Tr. p. 46).

The appellant in reply to the separate answer of the appellee, Alaska Mines Corporation, denies that appellee, Alaska Mines Corporation, was a bona fide purchaser for value, but alleges that it took the property and possession thereof with full notice and

knowledge of all the fraudulent actions alleged in appellant's complaint.

At the time of the filing of this suit appellant filed its written motion (Tr. p. 43), praying the court for an order appointing a receiver, pendente lite, to take possession and control of all of said assets, real and personal, belonging to the said Nome Consolidated Dredging Company and covered by said Thatcher and Sloan mortgages and the foreclosure proceedings had thereunder, as described in Exhibit "A" to the appellant's complaint, basing said motion for a receiver upon the said complaint and the affidavit of William A. Gilmore (Tr. p. 40), and upon all of the records and files of said Thatcher foreclosure suit and upon the records, files and proceedings in all other actions and suits, mentioned and pertaining to the property described.

Upon the filing of said complaint and affidavit and motion for a receiver, the court entered its order to show cause (Tr. p. 44), directed against the said appellees, ordering and directing them to show cause, if any they have, why a receiver should not be appointed in this suit, to take possession of all of the assets, real and personal, mentioned and described in appellant's complaint.

Subsequently, the said order to show cause against said appellees came on to be heard before the trial court on the 6th day of September, 1917.

The appellant, in support of its motion for a receiver, pendente lite, introduced and read in evi-

dence, the said complaint and affidavit above referred to, and also offered in evidence the original annual statement of the said Nome Consolidated Dredging Company, signed by said Powell, for the year 1915 (Tr. p. 37). Appellant also introduced and read in evidence the deposition of the said E. E. Powell (Tr. p. 47), taken in the case of George D. Schofield v. E. E. Powell, in the District Court, for the District of Alaska, on the 25th day of August, 1915, and taken at a time during the said foreclosure proceedings under the Thatcher and Sloan mortgages. The said appellee, George D. Schofield herein, having sued the said appellee, E. E. Powell, during said summer of 1915 for attorney's fees alleged to have been performed by him, involving the alleged conspiracy herein and other services. Reference to said deposition is hereafter made in our argument.

Appellant also offered a copy of the deposition of said appellee, George D. Schofield (Tr. p. 88), taken on the 31st day of August, 1915, in the said case of George D. Schofield v. E. E. Powell, for the purpose of showing the plan, scheme and conspiracy alleged in appellant's complaint. Reference to said deposition is hereafter made in our argument. Appellant also offered in evidence the deposition of said E. E. Powell (Tr. p. 115), taken in this suit on the 5th day of September, 1917, at Nome, Alaska, being the day before said motion and order to show cause for the appointment of a receiver came on for hearing before the court; said deposition being offered in evidence to prove, corroborate and substantiate the

charges of fraud and notice alleged in appellant's complaint. Reference to said deposition is also made hereafter in our argument.

The appellee, Alaska Mines Corporation, then in resistance to the motion of the appellant for a receiver, offered and read its separate answer (Tr. p. 143), together with the exhibits attached thereto, and also the affidavit of E. E. Powell (Tr. p. 180); also the affidavits of J. H. Miles (Tr. p. 201), H. S. Thompson (Tr. p. 207), Henry L. McCoy (Tr. p. 212), M. W. Newton (Tr. p. 214), R. G. Cunningham (Tr. p. 216), E. L. Webster (Tr. p. 217), J. C. Sheldon (Tr. p. 219) and G. J. Loman (Tr. p. 222).

The appellant in rebuttal at said hearing then offered and read to the court its reply to the separate answer of the appellee, Alaska Mines Corporation (Tr. p. 224); also the annual statement of the Alaska Mines Corporation (Tr. p. 228); also the affidavit of W. M. Eddy (Tr. p. 233), and the affidavit of W. A. Gilmore (Tr. p. 236).

The matter was then submitted to the trial court on argument and briefs and thereafter on the 22nd day of September, 1917, the court entered its opinion and order (Tr. pp. 238 and 242), refusing and denying the application for a receiver, pendente lite, whereupon the appellant appealed from said order refusing and denying the receiver.

Specification of Errors.

1. The court erred in making and entering said order and opinion refusing and denying the appellant's motion for a receiver, pendente lite, in the above entitled cause for the following reasons:

First: Because it appears from the record that the appellant was entitled to the appointment of a receiver to take possession of the assets, real and personal, involved in the litigation.

Second: Because it appears from the record that the appellant was entitled to the receiver to preserve the said assets, pendente lite, from waste and depreciation.

Third: Because it appears from the record that the appellee, Alaska Mines Corporation, a corporation, took the said assets in dispute, both real and personal, with full notice and knowledge of the rights of the appellant as a creditor of the appellee, Nome Consolidated Dredging Company.

Fourth: Because it appears from the record, undisputed, that the said assets were confiscated and taken from the said Nome Consolidated Dredging Company by fraud and that the appellee, Alaska Mines Corporation, had knowledge of said fraudulent actions.

Fifth: Because it appears from the record that the Alaska Mines Corporation has no other assets, save and except the assets involved in this action, and that a receiver, pendente lite, is necessary to prevent said assets from becoming further encumbered from

mortgages, or liens, or squandered, or dissipated pending the hearing of this suit on its merits.

Sixth: Because it appears affirmatively in the record that the said Alaska Mines Corporation was not a bona fide purchaser of said assets.

Seventh: Because it appears from the record that if the appellant prevails on the merits at the trial of the suit, a receiver should be necessary to take possession and sell the said assets to pay the judgment of appellant (Assignment of Errors, No. 1) (Tr. p. 249).

2. The court erred in making and entering said order refusing and denying appellant's said motion for a receiver, pendente lite, because it appears from the record that it was an abuse of discretion in the trial court in permitting the appellee, Alaska Mines Corporation, to hold possession, use and enjoy the property in dispute, real and personal, and the proceeds thereof, pendente lite (Assignment of Errors, No. 2).

3. The court erred in making and entering said order refusing and denying appellant's said motion for a receiver, pendente lite, because it was contrary to equity and justice (Assignment of Errors, No. 3).

Argument.

This creditor's suit to set aside the foreclosure proceedings is based on three grounds:

First. Because the Thatcher and Sloan mortgages were fraudulently made by the officers of the Nome Consolidated Dredging Company in pursuance of a plan or scheme, concocted by them to secure a preference to themselves without any regard to the rights of the said Nome Consolidated Dredging Company and without any attempt to benefit it thereby or to keep it as a going concern.

Second. That the said Thatcher and Sloan mortgages were made to secure a largely fictitious indebtedness by the use of spurious notes in pursuance of a combination and plan between the directors and officers of the said Nome Consolidated Dredging Company, to acquire the property and assets of said corporation for themselves and their associates, to be used by a new corporation contemplated to be organized, owned and controlled by them without any regard for the rights of the said Nome Consolidated Dredging Company or its creditors or innocent stockholders.

Third. Because the Nome Holding Company and the Alaska Mines Corporation were organized by the said conspirators as contemplated, and the said assets, real and personal, covered by said mortgages were transferred to said Alaska Mines Corporation, through the said conspirators, acting as officers and agents of said corporations, with full knowledge and notice of all of the fraudulent actions connected with said proceedings.

In order to assist the court in arriving at a better understanding of the facts in the case, we deem it advisable to refer more specifically to the record, as the appellant in this case in support of its motion for a receiver rests its case largely upon the testimony of appellees, E. E. Powell and George D. Schofield, together with the exhibits set out in the transcript. We submit that most of the facts are undisputed, except by general denials in the answer of said Alaska Mines Corporation. The record abounds with admissions of acts and conduct on the part of appellee Powell that conclusively proves fraud.

QUESTIONS OF FACT.

The testimony offered in this case can be subdivided and considered in three divisions:

First: Facts showing or indicating fraud on the part of Powell and his associates.

Second: Facts showing or indicating notice, actual or constructive to the appellee, Alaska Mines Corporation, now claiming ownership and possession as a bona fide purchaser for value without notice.

Third: Facts showing or indicating the necessity for appointment of a receiver herein.

1. *Facts showing or indicating fraud on the part of Powell and his associates.*

(1) Powell's fraudulent plan or scheme as outlined in the deposition of George D. Schofield (Tr. pp. 91 to 99).

(2) Spurious notes. See Schofield's deposition (Tr. pp. 100, 102 and 110).

(3) Powell's plan contemplated foreclosure before the mortgages were given. See Schofield's deposition (Tr. p. 96).

(4) Powell's plan contemplated double purpose in giving mortgage. See Schofield's deposition (Tr. p. 102).

(5) Powell's plan contemplated the freezing out of stockholders and creditors. See Schofield's deposition (Tr. p. 110).

(6) Powell got the Flat Creek dredge for a small consideration compared to its real value by reason of fraudulent suits. See Schofield's deposition (Tr. p. 112).

(7) Powell admits discussing spurious notes with Schofield. See Powell's first deposition (Tr. p. 86).

(8) The home office of the Nome Consolidated Dredging Company at Seattle had never heard of the Sloan mortgage in October, 1915, more than a year after it was made out according to the annual statement. See Powell's affidavit (Tr. p. 192).

(9) Newton, Powell and Eisenlohr control the Nome Holding Company. See Powell's second deposition (Tr. pp. 120 and 123).

(10) It was Powell's plan to wipe out all the assets, real and personal, of the Nome Consolidated Dredging Company. Powell's deposition (Tr. p. 134).

(11) Powell and his brothers owned two-thirds of all the Alaska Dredging Company. See Powell's first deposition (Tr. p. 67).

(12) Under the reorganization plan, Powell is now the general manager of the Alaska Mines Corporation, with an annual salary of $6,500. See Powell's deposition (Tr. p. 135).

(13) At the time of the foreclosure of the Thatcher and Sloan mortgages in 1915, Powell had sued and obtained judgment and sold the assets of the Anvil Hydraulic & Drainage Company, one of the former companies that owned practically all the mining land that was leased to the Nome Consolidated Company. See Powell's first deposition (Tr. p. 75).

(14) In the fall of 1915 Powell transferred the assets secured under the Thatcher and Sloan foreclosure proceedings to the Nome Holding Company and took a mortgage in his own name for $200,000, which is a lien against said assets of record. Powell is trustee in said $200,000 mortgage for the same identical creditors described in the Thatcher and Darling mortgages, showing conclusively that the

foreclosure proceedings were not brought and conducted to pay the indebtedness due under the mortgages, but for the sole purpose of obtaining said assets. See Powell's deposition (Tr. pp. 115 and 116).

(15) Powell holds a general power of attorney for the Nome Holding Company. See Powell's second deposition (Tr. p. 122).

(16) The Alaska Mines Corporation was organized for the purpose of taking over the property as contemplated in the original plan of Powell and his associates. See Powell's second deposition (Tr. p. 124).

(17) T. I. Crane, who was a preferred stockholder in the Nome Mining Company (also one of Powell's former companies), was the moving spirit and organizer of the appellee, Alaska Mines Corporation. See Powell's second deposition (Tr. pp. 123, 124 and 130).

(18) That the directors and officers of the Nome Consolidated Dredging Company were made preferred creditors. See the list of note owners and holders in the decree attached to the complaint (Tr. pp. 23 and 24).

(19) Part of the scheme was the writing of Schofield's letter which was sent by Powell to some of the stockholders, to whom they desired to boost the reorganization plan. See letter exhibit, Powell's first deposition (Tr. p. 48).

(20) The plan, scheme and conspiracy to confiscate the assets of the Nome Consolidated Dredging Company is clearly shown by the agreement, signed by Powell, Newton, Eisenlohr, Schofield, Bremer and Sloan. See Exhibit 1, Powell's second deposition (Tr. p. 139).

(21) The contemplated foreclosure was made with intent to transfer to the Nome Holding Company, which was then being organized at Seattle, Washington, by Powell's brother and others under his directions. This is conclusively shown by Powell's letter to his brother, set up as an exhibit to Powell's first deposition (Tr. p. 73).

(22) Powell says he bought the property at the Marshal's sale with intention to deed it to the new company then being organized. See Powell's first deposition (Tr. p. 81).

(23) The Sloan notes were spurious and the payees' names were written in at the time of the trial. See Powell's first deposition (Tr. p. 85).

(24) The plan was to freeze out the stockholders as well as the creditors of the Nome Consolidated Dredging Company. See Schofield's deposition (Tr. p. 110).

(25) The Nome Consolidated Dredging Company was insolvent and threatened with insolvency. See Powell's affidavit (Tr. p. 180); also see 1915 annual statement (Tr. p. 37), showing debts, $386,547.59, and this does not include the Sloan or Darling notes

as shown by the statement in Powell's affidavit (Tr. p. 192).

(26) The assets of the Nome Consolidated Dredging Company had a real value of only $200,000 at the time the mortgages were given in September, 1914. See Powell's first deposition (Tr. p. 81).

(27) Eisenlohr, Newton, Bremer and Powell have been associated together since the organization of the Wonder Dredging Company (also one of Powell's former companies), more than ten years ago. See Powell's first deposition (Tr. p. 77).

(28) That Powell was acting during the foreclosure proceedings as an officer of the Nome Consolidated Dredging Company and therefore in a fiduciary capacity for the stockholders and creditors. See sworn annual statement of Nome Consolidated Dredging Company for 1915 (Tr. pp. 38 and 39), being an exhibit offered in evidence, which is signed by E. E. Powell in October, 1915, several months after foreclosure proceedings were completed. Also see affidavit of W. A. Gilmore, wherein it is undisputed in record that said E. E. Powell paid the Scheid & Company bill of $121 the day before the Marshal's sale, in order to prevent contemplated involuntary bankruptcy proceedings (Tr. p. 236).

2. *Facts showing or indicating notice, actual or constructive, to the appellee, Alaska Mines Corporation.*

(1) Articles of incorporation of Nome Holding Company. See Powell's first deposition (Tr. p. 68).

(2) Nome Holding Company organized June 16, 1915, at Seattle, Washington, seven days before the Thatcher foreclosure suit was commenced.

(3) Powell is shown to be the organizer of the Nome Holding Company by his letter to his brother, dated July 26, 1915. See exhibit to Powell's first deposition (Tr. p. 73).

(4) Capital stock of Nome Holding Company was 50,000 shares at the par value of $1.00. See Powell's second deposition (Tr. pp. 71 and 120).

(5) All of the 50,000 shares of the capital stock of the Nome Holding Company were issued to the appellee, E. E. Powell, except 3 shares to the "dummy" incorporators, and part of said 50,000 shares of capital stock was redistributed by Powell to his fellow co-conspirators, Eisenlohr, Newton, Crane and Webster. See Powell's second deposition (Tr. pp. 120 and 121).

(6) Powell admits that he holds 40 per cent of the capital stock of the Nome Holding Company, to-wit: 20,000 shares at a ratio of 80 to 1, which is the equivalent of 1,600,000 shares of the capital stock of the Alaska Mines Corporation. See Powell's deposition (Tr. pp. 121 to 127).

(7) Powell arranged the sale and sold the assets of the Nome Holding Company to the Alaska Mines Corporation. See Powell's second deposition (Tr. p. 125).

(8) The recitals in the deeds of conveyance, Exhibits "C", "D" and "E" attached to the answer of

the Alaska Mines Corporation, show that the court confirmed the Marshal's sale on September 27, 1915; Powell's transfer of the assets to the Nome Holding Company was in October, 1915, during the period of redemption; the Nome Holding Company transferred the said assets, real and personal, to the Alaska Mines Corporation, August 15, 1916, and during the period of redemption; the Marshal deeded to Powell, September 28, 1916 (Tr. pp. 168, 173, 176).

(9) Powell, Newton, Eisenlohr and Crane are all directors of the Alaska Mines Corporation. See Powell's second deposition (Tr. p. 141).

(10) Powell admits in his affidavit that the directors of the Alaska Mines Corporation approved the purchase of the said assets (Tr. pp. 200 and 201).

(11) Powell and Newton were witnesses in the appellant's suit in the Court of Common Pleas in Philadelphia, prior to the organization of the Alaska Mines Corporation. See Powell's second deposition (Tr. p. 137).

(12) Powell, Eisenlohr, Newton and Webster were officers and directors of the Nome Consolidated Dredging Company at the time the mortgages were made and during the foreclosure proceedings, and are such officers yet. See Powell's second deposition (Tr. pp. 138 and 142).

(13) There was no consideration whatever for the transfer from Powell to the Nome Holding Com-

pany of the assets secured by the foreclosure proceedings. Powell simply took a mortgage from the Nome Holding Company to himself for the sum of $200,000 and conveyed the property to the Nome Holding Company according to the contemplated plan when the mortgages were made (Tr. p. 116).

(14) The only consideration for the conveyance from the Nome Holding Company to the Alaska Mines Corporation was the delivery of a stock certificate for 3,701,820 shares of capital stock of the Alaska Mines Corporation to the Nome Holding Company (Tr. pp. 126 and 155).

(15) What became of, and who votes, the 3,701,820 shares so delivered? See Powell's second deposition (Tr. p. 128).

(16) The date of appellant's judgment in the Court of Common Pleas at Philadelphia was June 5, 1916, and the Alaska Mines Corporation was organized on June 9, 1916.

3. Facts showing or indicating the necessity for the appointment of a receiver.

(1) The conveyances set out as exhibits in the answer of the Alaska Mines Corporation (Tr. p. 143), when compared with the decree of the court in the Thatcher case, set out as an exhibit (Tr. p. 19) to appellant's complaint, show that all of the assets of the Alaska Mines Corporation are the same assets that belong to the Nome Consolidated Dredging Company and were fraudulently, by rea-

son of the foreclosure proceedings, taken from said debtor.

(2) It nowhere appears in the record that the Alaska Mines Corporation has acquired any other assets, except the purchase of a half-interest in a placer claim and dredge hull from one H. Greenberg, upon which the record shows there is a mortgage indebtedness of $35,000 (Tr. p. 132).

(3) The mortgage liens against the said assets are shown in Powell's second deposition (Tr. pp. 130, 131 and 132).

(4) The Alaska Mines Corporation, on August 4, 1916, a few days before it purchased the assets of the Nome Holding Company as shown by the annual statement filed August 1, 1917, in the office of the clerk of the District Court of Alaska, had an indebtedness of $406,000 (Tr. p. 229).

(5) That some of the property is being wasted as alleged in appellant's complaint. See the affidavit of W. M. Eddy, showing that the Wonder dredge has been dismantled and most of its parts scattered on the tundra, exposed to the elements (Tr. p. 233).

(6) The appellee, Alaska Mines Corporation, alleges it intends to mine the gold from the ground in dispute and appropriate it to its own use. See affidavit of W. M. Eddy (Tr. p. 234). Also see Powell's second deposition where he boastfully states that they intend to mine the ground and keep the gold (Tr. pp. 134 and 135).

(7) The Alaska Mines Corporation is using and intends to use the power plant to its maximum capacity. See the affidavit of J. H. Miles (Tr. p. 202).

(8) Such use of the power plant, under such conditions, would soon wear and waste the said plant and render it valueless. See affidavit of W. M. Eddy (Tr. p. 235).

From the foregoing references, the court can readily see the clever and underhanded scheme and method Powell and his pet associates took in trying to get rid of bothersome creditors and obnoxious and inquisitive stockholders. Early in 1913, the record shows, Powell and his personal attorney, Schofield, who was also the attorney for the Nome Consolidated Dredging Company, formulated the scheme and drew up and executed a copy of the contemplated mortgage which Powell took East with him in the winter of 1913 and spring of 1914, where he confided and planned with Newton, Eisenlohr and others. The appellant was getting troublesome by beginning its suit at Philadelphia. The whole plan was agreed to and Powell returned to Nome in the summer of 1914 and in September the mortgage for $200,000 arrived as planned, but the bank at Nome refused to get tangled up with the spurious notes, so after considerable telegraphing an additional mortgage (Thatcher mortgage) for $25,000 was

executed by Powell, which also included alleged claims of Newton, Eisenlohr, Webster and others interested in the general scheme.

The record conclusively shows it was the intent and scheme all through to engulf and annihilate the Nome Consolidated Dredging Company and not to aid it in its financial difficulties or mining affairs. The mortgages were planned, not for security, not to assist the corporation, but simply to embarrass, wreck and financially swamp it, so that by the contemplated foreclosure its assets could be gobbled by the wreckers—its confidential officers and agents.

By scheming and conniving with Ewing and Sloan, the record shows that Powell got possession of nearly a hundred thousand dollars' worth of the Nome Consolidated Dredging Company's property for the paltry sum of $4,000. This was part and parcel of the general plan of Powell and his associates to wipe out and annihilate the Nome Dredging Company. The notes were given in September and most of them fell due in December without any hope or anticipation of ever being paid from any fund available. The whole foreclosure proceedings were rushed and hurried by Powell, acting for all the parties thereto. The troublesome bank was paid off in full before the foreclosure proceedings were begun; the Nome Mining Company had a prior first lien mortgage of $100,000 on the property, yet to prevent delay, it was not named as a party to the Thatcher foreclosure proceedings by Powell; the

Nome Holding Company was rapidly being organized at Seattle by Powell's dummy incorporators, including a pliant brother.

Everything was done that could be done by Powell and his associates to get the plan in execution before the appellant could perfect its judgment in the courts of Pennsylvania and get into the courts at Nome. Small troublesome creditors in the town of Nome were paid off by Powell during the summer of 1915, while the foreclosure proceedings were pending, in order to prevent bankruptcy proceedings. The transfers of said assets were made to the Nome Holding Company by Powell without any consideration whatever, and a $200,000 mortgage taken by Powell in his own name as trustee and placed of record. A general power of attorney was issued to Powell and all of the 50,000 shares of the capital stock of said Nome Holding Company was issued to Powell, except 3 shares to the dummy incorporators. Thus armed, Powell started East to invade the financial centers, where his fellow schemers impatiently sat waiting his arrival. Immediately Crane, Eisenlohr and Newton got busy, and with the aid of more dummies, incorporated the Alaska Mines Corporation with a capital stock of 10,000,000 shares at $1.00 per share, with nothing paid in.

The dummy incorporators were immediately replaced by Crane, Eisenlohr, Newton, Powell and others, and Powell thereupon transferred all of said

assets from the Nome Holding Company (himself and associates) to the Alaska Mines Corporation (also himself and same associates), subject to the $200,000 mortgage (also himself and same associates) for 3,701,820 shares of the capital stock of said Alaska Mines Corporation. Not a dollar changed hands. The only working capital the concern ever had was from the sale thereafter of some 600,000 shares of capital stock, sold on the curb in New York, leaving over 5,000,000 shares still in the treasury.

Thus we see the management of the Alaska Mines Corporation by the voting power passed into the control of Powell to do as he pleased for himself and fellow plotters. Of the seven directors of the Alaska Mines Corporation, Crane, Eisenlohr, Newton and Powell constituted the majority. In addition, Powell holds its general power of attorney and is its general manager at an annual salary of $6,500 per year.

So we find Powell in possession of all the mining land formerly owned by the Anvil Hydraulic & Drainage Company, upon which a royalty or rent through lease is to be paid by the working or operating company to him and his associates. We find him as the Nome Holding Company with voting power and complete control of the Alaska Mines Corporation, with general authority from both concerns and a luscious salary of $6,500 for incidentals, while the worried creditors and deluded stockhold-

ers of his former wrecked companies stalked the earth looking for justice.

QUESTIONS OF LAW.

The court erred in denying and refusing appellant's motion for a receiver.

Out of such a record of facts three legal questions arise for the court to pass upon in deciding this appeal, to-wit:

1st. Fraud in preferring the officers and stockholders as against appellant and other creditors of the insolvent corporation.

2nd. Notice on the part of the Alaska Mines Corporation of such fraud and of the rights of appellant.

3rd. Necessity for a receiver and the duty of the court to appoint.

1. *Fraud in preferring the officers and stockholders as against appellant and other creditors of the insolvent corporation.*

All of the errors assigned can be discussed under the ruling of the court in refusing to grant the appellant's motion for a receiver, pendente lite. The appellant contends that Powell and his associates fraudulently preferred themselves by their acts as against the appellant, and thereafter, in organizing the Alaska Mines Corporation as part and parcel of

their fraudulent scheme, the said Alaska Mines Corporation took the property with full notice and knowledge of the fraudulent acts, and that the said Alaska Mines Corporation is now in possession, using and controlling the assets, real and personal, that should belong to the creditors of the Nome Consolidated Dredging Company.

This suit is brought in pursuance of the well-known right of a judgment creditor to set aside a fraudulent conveyance by a debtor, it being a recognized rule of equity that judgment creditors of an insolvent corporation may sue in equity to impeach or set aside a conveyance, transfer or mortgage of property, or confession of judgment to it for the benefit of its directors or other officers, if made while the corporation was insolvent, or in contemplation of insolvency, and is void against such creditors on that ground, or if made without consideration, or if made with intent to hinder or delay the creditors.

The above rule is supported by all the modern text writers on private corporations.

Directors or other officers of a corporation cannot, by conveyance, mortgage or otherwise, when the corporation is insolvent, obtain, as creditors of a corporation, any preference over other creditors and if they attempt to do so other creditors are entitled to relief in equity.

Sutton Mfg. Co. v. Hutchinson, 63 Fed. 496;
2 Cook on Corporations, Sec. 653;
Railway v. Ham, 114 U. S. 587;

Grantham v. Railway Co., 102 U. S. 148;
Richardson's Ex'r. v. Green, 133 U. S. 30;
Oil Co. v. Marbury, 91 U. S. 587.

The opinion in the Sutton case (supra), is by Justice Harlan of the Supreme Court of the United States, sitting as a Circuit Court Justice in the 7th Circuit Court of Appeals, and is a clear and elaborate enunciation of the law as applicable to the facts in the case at bar. The facts in the Sutton case were somewhat similar in that certain members of a certain family owned stock in both the manufacturing company and the mortgage company. In discussing the fiduciary relations and obligations of directors and officers of insolvent corporations, the court at page 502, says:

> "In our judgment, when a corporation becomes insolvent and intends not to prosecute its business, or does not expect to make further effort to accomplish the objects of its creation, its managing officers or directors come under a duty to distribute its property or its proceeds ratably among all creditors, having regard, of course, to valid liens or charges previously placed upon it. Their duty is 'to act up to the end or design' for which the corporation was created (1 Bl. Comm. 480), and when they can no longer do so, their function is to hold or distribute the property in their hands, for the equal benefit of those entitled to it. Because of the existence of this duty in respect to a common fund in their hands to be administered, the law will not permit them, although creditors, to obtain any peculiar advantage for themselves to the prejudice of other creditors. This rule is imperatively demanded by the principle that one who has the possession and con-

> trol of property for the benefit of others—and surely an insolvent corporation, which has ceased to do business, holds its property for the benefit of creditors—may not dispose of it for his own special advantage to the injury of any of those for whom it is held. That principle pervades the entire law regulating the conduct of those who hold fiduciary relations to others, and, instead of being relaxed, should be rigidly enforced in cases of breach of duty or trust by corporate managers, seeking to enrich themselves at the expense of those who have an interest equally with themselves in the property committed by law to their control. It would be difficult to overstate the mischievous results of a contrary rule, as applied to those entrusted with the management of corporate property."

The Sutton case is an elaborate brief in itself and the court clearly distinguishes the line of cases, holding that a mortgage made in good faith without intent to hinder, delay or defraud other creditors, but for the sole purpose of preferring a particular creditor, while the corporation is a going concern, from the line of cases which hold that the officers and directors of an insolvent corporation cannot with intent to hinder, delay and defraud other creditors, and in bad faith, through any design or device, prefer themselves by such mortgages.

In the case at bar it is admitted by both Powell and Schofield, that it was the intent to prefer the officers and directors of the Nome Consolidated Dredging Company under the plan and scheme of completely wiping out its assets by a contemplated foreclosure.

"For the directors or contracting officers of a corporation, when insolvent, to divert its property or pledge its credit to the payment or securing of their individual debts, is a fraud and breach of trust toward the corporation, its shareholders and a fraud as to its creditors."

10 Cyc., p. 799.

"The governing principle is that directors and managers of an insolvent corporation are the trustees of the funds as well for the creditors as for the corporation and are bound to apply them pro rata, and cannot use them to exonerate themselves to the injury of other creditors."

10 Cyc., p. 1256.

In Penn. Railroad Co. v. Pedrick, 222 Fed. p. 75, the court says:

"It is hardly supposable that the officers and directors of a corporation, (insolvent), are at liberty, without liability to the creditors of such corporation, to take its assets and convert them to their own use in payment of the debts of the corporation to themselves and a favored few of the creditors * * * It must be that there is an implied contract on the part of the directors and officers of a corporation to, at least, use reasonable care and diligence to see to it that the assets of the corporation are not dissipated, or wasted, or misapplied, or applied to the payment of their own individual claims against the corporation when it is insolvent or its insolvency is imminent, * * * if such is not the law, then officers of a corporation, including the directors whose duty it is to use reasonable care and diligence to apply the assets of a corporation to the payment of its just debts and obligations without preference in case of actual or impending insol-

> vency, may create liabilities of the corporation to themselves, the other creditors being ignorant of such action, and in case of actual or impending insolvency, take advantage of their confidential and trust relations and the knowledge that they alone have of actual conditions, use the entire assets of such corporation to pay themselves to the exclusion and great damage of other creditors. Such a condition of the law would be intolerable."

In Koehler v. Black River Falls Iron Co., 67 U. S. 715, it was held that the directors of a corporation, executing a mortgage securing to themselves an advantage not common to all the stockholders, were guilty of an unauthorized act, violating their trust. In that case the invalidity of the mortgage was asserted by the corporation itself, as being a fraud by the directors on other stockholders and the Supreme Court said:

> "Instead of necessarily endeavoring to effect a loan of money, advantageously for the benefit of the corporation, its directors, in violation of their duty and in betrayal of their trust, secured their own debts to the injury of the stockholders and creditors. Directors cannot thus deal with the important interests intrusted to their management."

The allegations of the complaint are, and the record overwhelmingly supports the allegations of the complaint, that E. E. Powell, acting as vice-president of the Nome Consolidated Dredging Company, together with M. W. Newton, president, and Louis Eisenlohr, director of the company, on or before September 14, 1914, entered into a combination

together, to secure the property of the Nome Consolidated Dredging Company for themselves by means of placing on the property of the corporation, mortgages, foreclosing the same and obtaining the property of the Nome Consolidated Dredging Company at the lowest price possible, by reason of fictitious notes to be used at the sale, and thereafter organizing a new corporation which would carry on the business then attempted to be carried on in the name of the Nome Consolidated Dredging Company. This plan was consummated through said Powell, vice-president of the company and its general manager, who executed the mortgages to secure notes to the extent of $225,000, which said notes were issued in blank, most of which notes were retained by said Powell and the payees' names written therein just prior to the foreclosure proceedings; that these notes were largely made to secure a fictitious indebtedness and were made for the purpose of covering the property with a large amount of apparent indebtedness to prevent other creditors from stepping in and securing themselves; that thereafter, in pursuance of the plan indicated, Powell began and conducted the foreclosure proceedings, and by use of a cleverly prepared decree, the whole property of the Nome Consolidated Dredging Company was sold at the earliest possible moment to said Powell for the small consideration of $23,000.

These facts constitute an actual fraud upon the creditors of the corporation and the proceedings

were void as to them. How ridiculous it is for appellees to contend to the court that the officers and directors of the Nome Consolidated Dredging Company had a right under these circumstances to prefer themselves as creditors by mortgages, to cover alleged indebtedness. The mortgages were not made in good faith, but were made with the intent and in accordance with the plan and scheme to obliterate the assets of the Nome Consolidated Dredging Company and to prevent it from operating as a going concern.

In Jackson v. Ludeling, 88 U. S. 616, the Supreme Court says:

> "They (directors), had no right to enter into or participate in a combination, the object of which was to divest the company of its property and obtain it for themselves at a sacrifice or at the lowest price possible. They could not rightfully place themselves in position in which their interests were adverse to those of the stockholders or bondholders and the defendant could take nothing from such sale."

This was exactly what the directors of the Nome Consolidated Dredging Company did in the case at bar. This is shown by the testimony of E. E. Powell (Tr. p. 134) as follows:

> "Q. Now, in 1915 in the Thatcher, Darling foreclosure suits, all of the assets of the Nome Consolidated Dredging Company were included in that foreclosure, were they not, subject to that mortgage?
> A. Yes, sir.
> Q. And bid in all of the assets?
> A. Yes, sir.

Q. Has the Nome Consolidated Dredging Company any property anywhere that you know of?
A. It has not.
Q. And didn't have after that foreclosure?
A. No, sir.
Q. Either in Alaska or elsewhere?
A. No, sir."

Railroad v. Howard, 7 Wall. 292, was a case also, of foreclosure of a mortgage and sale which was had under an arrangement advantageous to the mortgagees and stockholders, under which the mortgagees, according to their priority, got a certain percentage of their debt and certain stockholders, a residue of the proceeds. The sale under the mortgage and foreclosure was held fraudulent against general creditors unsecured by the mortgage.

For another case that is on all fours with the case at bar, we cite the court to the case of Central Georgia Railway v. Paul, 93 Fed. page 878. In this case a plan of re-organization had been entered into between certain stockholders and secured creditors of an insolvent corporation, whereby all the property of the corporation was sold by foreclosure and transferred to a new corporation, the stockholders of the old corporation retaining their interest and rights by virtue of their interest in the old corporation, and it was held to be a fraud on an unsecured creditor of the old corporation; it was further held that such creditor might hold the new corporation for his debt.

In Wardell v. Union Pacific Railroad Co., 103 U. S. 651, Justice Field said:

> "All arrangement by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the Courts for consideration."

We see the two lines of cases clearly distinguished by Cyc. in the following quotations:

> "It is to be regretted that some of the American Courts have carried the right of an insolvent corporation to prefer creditors to the extent of holding that it may not only prefer creditors who are its own shareholders, but may prefer such as are its own directors."
>
> 10 Cyc., 1253.

This is the doctrine relied upon by the appellees and they will no doubt in their brief, cite many decisions to uphold the same, relying among others on the case of Anderson v. Bullock Co. Bk., (Ala.) 44 L. R. A. 766, but this is not the better doctrine and is not in accordance with the great weight of authority.

> "The better doctrine, and one resting on principles of justice too obvious for explanation or comment, is that when a corporation is

> insolvent, or when it reaches such a condition that its creditors see that they must deal with its assets in view of its probable suspension, they, (its officers), cannot use those assets to prefer themselves, as creditors or sureties, in respect of past advances, to the prejudice of its general creditors."
>
> 10 Cyc., 1255, and numerous cases cited in support of the rule.

The case of National Bank v. Johnson, 219 Fed. 89, cited and relied upon by the appellees in the court below, is clearly not in point in this case, because the court in that case found that the preference given to the officers of the company were not tainted with fraud, either constructive or actual.

The cases cited and relied upon by the appellees, were cases that are predicated upon the assumption of fact, that the preference made or given to the directors or officers of the corporation, were made or given without any intent to defraud creditors and usually for the purpose of securing funds or credit to keep the corporation a going concern. They cited and relied upon 7 R. C. L. Sec. 774. The very concluding lines of said paragraph states:

> "Where the officers of a corporation prefer themselves as creditors, the court will, however, closely scrutinize the bona fides of the transaction and will cast on them, as in the case of other dealings between a corporation and its officers, the burden of showing good faith."

The rule relied upon by them does not fit the facts in the case at bar. The record here discloses

that the officers and directors of the Nome Consolidated Dredging Company planned to place the mortgages of record with the sole intention of foreclosure so as to acquire the property with the very purpose and intent of organizing such a company as the Alaska Mines Corporation to hold the same for them and their benefit. Not a single case cited by counsel for appellees in the court below, holds that the officers and directors of an insolvent corporation may prefer themselves to other creditors with intention to defraud.

2. Notice on the part of the Alaska Mines Corporation of such fraud and of the rights of appellant.

An examination of the record in this case will clearly convince the court that the Alaska Mines Corporation was a creature of Powell, Eisenlohr, Newton and Crane. It was organized by them as part and parcel of their scheme, originally conceived and planned prior to the time the mortgages were executed and given.

The organization of the Nome Holding Company was nothing more than a dummy corporation, created by Powell, Newton, Eisenlohr and others for the same purpose. This is conclusively shown by Powell's letter to his brother (Tr. p. 73) as follows:

"Nome, Alaska, July 26th, 1915.

Mr. F. S. Powell,
324 N. Y. Block,
Seattle, Wash.

Dear Brother:—

On receipt of this, if you have got your organization completed, get into communication with Mr. M. W. Newton (copy of whose letter I herewith enclose you), as he will probably write you and request you to put him on the Board of three Trustees; this gives you a majority there at Seattle to transact business with.

Let Mr. Trenholme resign and that will leave you and Dutton on the Board. Mr. Trenholme probably does not want to be bothered with it. See my letter to Mr. Newton.

Write Mr. Newton and tell him you are ready to put him on and when this is completed, I will turn the property over to the company. Also send me in my authority to transact business, the same authority given me in the N. C. Company.

(Signed) E. E. POWELL."

The above and foregoing letter was written during the foreclosure proceedings and shows conclusively that Powell, Newton and others were organizing the Nome Holding Company for the purpose of taking over the assets of the Nome Consolidated Dredging Company. In his deposition, Powell frankly admits that he transferred all of the property to the Nome Holding Company in the fall of 1915, without any consideration whatever, except that he took a mortgage from the Nome Holding Company for $200,000 and placed it of record.

That Powell, Newton, Eisenlohr and Crane, in accordance with their plan and scheme, organized

the Alaska Mines Corporation is conclusively shown by the testimony of Powell on page 124 of the Transcript:

> "Q. Now did you know that the Alaska Mines Corporation was going to be organized before the 9th day of June?
>
> A. Yes, sir.
>
> Q. Who told you?
>
> A. Why, Mr. Crane. I had a talk with him several times about organizing a company.
>
> Q. After you transferred this property to the Nome Holding Company and got a mortgage back, you went to New York and Philadelphia that fall, didn't you?
>
> A. Yes, sir.
>
> Q. And you went back there for the purpose of organizing a new company to exploit these properties?
>
> A. Yes. I went back to see what I could do and we finally got down to a place where they wanted me to sell their property for them if I could.
>
> Q. You went to Mr. Gayley to get him to organize a company to exploit this property?
>
> A. I went to him after awhile; I also went to several gentlemen.
>
> Q. And as a result of numerous negotiations with Mr. Gayley, the Alaska Mines Corporation was organized, was it not?
>
> A. Yes, sir."

After the schemers had organized their new corporation, the Alaska Mines Corporation, Powell on behalf of the Nome Holding Company, transferred all of the said assets to the Alaska Mines Corporation for 3,701,820 shares of the capital stock of the Alaska Mines Corporation and for no other consideration (Tr. p. 126). The Alaska Mines Corpora-

tion had no other assets. It was organized for the sole purpose of taking over these assets and took title to the same within the year of redemption and before the U. S. Marshal had issued his deed to Powell. Not one dollar changed hands between the companies. The Alaska Mines Corporation was organized purposely to receive a conveyance from the Nome Holding Company and the Nome Holding Company had been organized by the same parties purposely to take the title from Powell. This was constructive notice to said Alaska Mines Corporation. In the face of such a record, how can the Alaska Mines Corporation seriously contend that it was an innocent purchaser for value and without notice?

The Alaska Mines Corporation deraigned its title from the foreclosure proceedings by written instruments that were of record. Thus it had notice of the foreclosure proceedings. Powell purchased the assets at the marshal's sale for $23,000 and through collusion with Ewing and Sloan, acquired other valuable property belonging to the Nome Consolidated Dredging Company, worth nearly $100,000.00 for the paltry sum of $4,000.

In the fall of 1915, Powell swore to an annual statement that was filed in the office of the Clerk in the District Court at Nome (Tr. p. 37), that the assets were worth $670,906.31. These were the same assets that Powell swore in his deposition on August 25, 1915, and during foreclosure proceedings were worth $200,000 (Tr. p. 81). These were

the same assets also that Powell, in an annual statement of the Alaska Mines Corporation on August 4, 1916, swore were worth $2,000,000 (Tr. pp. 228-229). By the fraudulent acts they acquired them for a total of $27,000. The Alaska Mines Corporation took title from Nome Holding Company during the period of redemption and were thus put on inquiry.

Powell, Newton, Eisenlohr and Crane owned the majority of the stock of the Nome Holding Company and thus owned and controlled the 3,701,820 shares of the capital stock of the Alaska Mines Corporation. This was all of the stock of the Alaska Mines Corporation that was issued, except about 600,000 shares that were subsequently sold on the curb in New York according to the record.

The appellant contends that the Alaska Mines Corporation, by virtue of its organization by Powell, Eisenlohr, Newton and Crane for the purpose of taking and holding the assets fraudulently acquired, thereby became and is merely a corporation organized by said stockholders to further or carry out their plan to acquire and own the assets of the debtor company; that by reason thereof, the Alaska Mines Corporation had notice of all of the fraudulent acts and doings of Powell and his associates. An entirely different question would arise if the Alaska Mines Corporation had been a stranger corporation already in existence and officered by strangers and had purchased the assets for value. It might then be permitted to claim lack

of notice or knowledge. It might then be within the rule of some of the cases relied upon by it.

In the case of Wilson Coal Co. v. U. S., 188 Fed. 546, the opinion of the court being delivered by Judge Gilbert, the court will find the law of notice to corporations clearly stated as follows:

> "Where one who has notice of the infirmity of his own title to land obtained from the government, unites with others to form a corporation and subscribes for nearly all of the stock, conveying the land in payment of his subscription, the corporation is affected with notice of the circumstances, impairing the title and cannot claim protection against a suit for cancellation of the patents as a bona fide purchaser without notice."

Again in the same case:

> "A corporation, which has taken land obtained by entry from the United States, with notice of fraud in its acquisition, cannot defend a suit by the Government for cancellation of the patents, by showing that stockholders purchased its stock in good faith and in ignorance of the defect in the title of the land."

So we see that it is immaterial that a few innocent persons bought 600,000 shares on the New York curb.

The decision of our Circuit Court in the Wilson Coal Co. case (supra), was cited with approval by Justice Holmes of the Supreme Court of the United States in the case of Linn Timber Co. v. U. S., 236 U. S. 577. With reference to the notice of corporations in that case we quote the syllabus:

> "This court follows the finding of fact of two courts below in this case, that the corporation was a mere tool of the individual organizing and controlling it and holding most of its capital stock, that his knowledge as to fraud was its knowledge, and that the corporation was a party to an effort to conceal the title until the period of limitation. had expired."

The Supreme Court also in this Linn Timber Co. case, cited with approval the case of McCaskill Co. v. U. S., 216 U. S. 504. In the latter case, the opinion of the court was delivered by Justice McKenna, and is a clear statement of the law applicable to the facts of the case at bar. In this case the Supreme Court of the United States clearly distinguished the case of Frenkel v. Hudson, 82 Ala. 162, and the case of Innerarity v. Bank, 139 Mass. 332, and other cases relied upon by the appellees in the court below. We particularly direct the court's attention to pages 514 and 515 of the opinion, wherein the Supreme Court states:

> "The growing tendency is therefore exhibited in the court to look beyond the corporate form to the purpose of it and to the officers which are identified with that purpose",

also quoting with approval the doctrine laid down by Cook on Corporations, and reaffirming the principles enunciated in the case of Simmons Creek Coal Co. v. Doran, 142 U. S. 417.

Powell's act in transferring all of the assets of the Nome Holding Company, including its good will, etc., to the Alaska Mines Corporation for stock in said corporation, was contrary to public policy, ultra

vires, and a fraud in itself, and was enough to put the Alaska Mines Corporation on inquiry.

Clark & Marshall on Private Corporations, Vol. 1, Sec. 196;

McCutcheon v. Merz Capsule Co., 71 Fed. 787.

A corporation is not a bona fide purchaser for value when it only issues its stock in payment for the property purchased.

2 Cook on Corporations, Sec. 764;

Rodgers v. N. Y. etc. L. Co., 32 N. E. 27.

> "A sale of the whole property and trade of a company, or of any property, known to be necessary to carry on its business, would not be binding, even in favor of a person acting in good faith, unless the circumstances under which the transaction would be proper, actually exist. A person dealing with the agents selling the property would not be entitled to assume the existence of circumstances of so unusual a character."

Morawetz on Private Corporations, Sec. 606;

Rollins v. Clay, 33 Me. 132.

A new corporation is affected with knowledge possessed by its promoters with respect to title to property which they convey to it.

> "Where a director who had purchased lands from a corporation, united with others in forming a new corporation, he subscribing for almost all of the stock therein, and becoming one of its officers and directors, and on the next day, in pursuance of one entire plan, conveyed the same lands to the new company in payment of his stock subscription for such stock, it was held that the new company was affected with notice

> of circumstances impairing the title of the party so conveying the lands to it, and could not claim to be a bona fide purchaser without notice."
>
> 10 Cyc. 1059;
>
> Hoffman Steam Coal Co. v. Cumberland Coal Co., 16 Md. 456; 77 Am. Dec. 311.

In a strict sense a corporation can only acquire constructive notice or knowledge as it must act through officers and agents. Constructive notice is notice in law. Constructive notice is generally a conclusion of law from a state of facts established or admitted. So in this case, Powell admits that he, Newton, Eisenlohr, Crane and others contemplated all the acts that were done in advance of the giving of the mortgages. He also further admits that he and Newton were witnesses at the trial of appellant's case in Philadelphia at or about the time of the organization of the Alaska Mines Corporation. This was certainly constructive notice to the Alaska Mines Corporation, of which they were the promoters and owners. Ordinarily it is very difficult to prove fraud, but in this case the transcript fairly bristles with admitted acts and things which conclusively prove the fraud alleged in the complaint notwithstanding the denials of the answer.

The appellees in the court below cited numerous cases to show that various kinds of notice to officers, directors and agents of corporations, do not constitute notice to the corporations, citing almost all exceptions to the general rule and yet they overlook the plain facts in this case that the Alaska Mines

Corporation was the creature of the conspirators, organized as part and parcel of the scheme to rob the creditors and stockholders of the Nome Consolidated Dredging Company, and that a majority of the directors of the said Alaska Mines Corporation, to wit: Crane, Eisenlohr, Newton and Powell had notice of the fraudulent acts or some of them, and two of these directors, Powell and Newton, were witnesses in the court in Philadelphia and knew of the rights of the appellant and that the Alaska Mines Corporation is controlled by the Nome Holding Company.

3. Necessity for a receiver and the duty of the court to appoint.

Section 1595 of the Compiled Laws of Alaska provides that a receiver may be appointed in a civil action on the application of either party, when its rights to the property which is the subject of the action or proceedings and which is in the possession of the adverse party, are probable, and the property or its rents, or profits, are in danger of being lost, materially injured or impaired.

The party seeking the relief of the appointment of a receiver, must show that he has a probable right or interest in the property or fund involved in litigation and that there is danger of it being lost, dissipated or wasted.

In the case at bar, the appellant has shown that he is a judgment creditor, having a large judgment

of record unsatisfied against the debtor company, whose property was fraudulently taken by its officers and now admitted to be in the possession of the Alaska Mines Corporation, controlled by them.

> "A receiver may be appointed at the suit of a judgment creditor of a corporation for the purpose of reaching the equitable assets of the corporation and subjecting the same to the satisfaction of the judgment when there are assets which should be applied to its payment and the creditor has exhausted his legal remedies, or the circumstances are such that to deny the application will lead to a wasting or loss of the assets which might be made available for the payment of debts, and which cannot be availed of in any other manner as satisfactorily as by the appointment of a receiver."
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> Clark & Marshall on Private Corporations, Vol. 3, p. 2397;
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> 3 Cook on Corporations, Paragraph 863 and notes;
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> 8 R. C. L. p. 36, Sec. 40.

> "A judgment creditor who has exhausted his legal remedy may pursue in a court of equity, any equitable interest, trust or demand of his creditor, in whomsoever hands it may be."
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> 8 R. C. L. p 6, Sec. 5;
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> Candler v. Pettit, 19 Am. Dec. 399.

> "The appointment of a receiver upon a creditor's bill is a usual practice and is almost a matter of course where the object of the bill is to reach personal assets, and in this class of cases, receivers are almost uniformly granted before answer."
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> 8 R. C. L. p. 36, Sec. 40.

> "It is a well established practice to appoint a receiver of the defendant's property in aid of a creditor's bill. Such appointment is discretionary with the court, and is usually made as a matter of course, where the property is in danger of waste."
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> 12 Cyc., p. 49.

The record in this case shows that most of the assets involved in this litigation, consist of personal property in the nature of dredges and an electric power plant, together with leases on certain mining claims and a few mining claims of doubtful value. The record shows that these assets are encumbered by mortgages, amounting to over $300,000, together with other unsecured indebtedness, belonging to the Alaska Mines Corporation. The appellees filed several affidavits to make a large showing that they had expended large sums of money in repairing and improving the personal property, but the fact remains that the record is uncontradicted that the constant use of the power plant will wear out and deteriorate the said plant and in time make it worthless. The record also shows that about the only valuable placer claim owned by the Nome Consolidated Dredging Company at the time the assets were taken, was the Carnation Group, upon which the Alaska Mines Corporation is now engaged in mining and extracting the gold and appropriating it to its own use.

It is appellant's contention that by reason of their fraudulent acts, the Alaska Mines Corporation today, is in possession of property wrongfully taken

from appellant's judgment debtor, and that appellant is entitled to have the said property preserved, pendente lite, so that on the final hearing of the case, the said property can be sold and distributed in satisfaction of appellant's judgment.

The necessity for the appointment of a receiver is clearly shown in the Transcript, pages 134-135:

> "Q. The Alaska Mines Corporation now has two dredges operating hasn't it, at the present time?
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> A. Yes, sir, one on Bourbon Creek and one on Flat Creek, both mining under full swing and using the power plant that was sold under the Thatcher foreclosure. The Alaska Mines Corporation is about to complete another dredge, known as the Greenberg or Bessie dredge on Holyoke, and expects to operate that very soon. It is the same size as the other two dredges. It is the intention of the Alaska Mines Corporation to operate all three dredges and mine as rapidly as possible with them as soon as they can. They may not get to it this fall. It is the intention of the Alaska Mines Corporation to operate the remainder of this mining season with these two dredges that are now working.
>
> Q. And the Alaska Mines Corporation intends to appropriate and take all the gold dust and gold extracted and keep it?
>
> A. Yes, sir.
>
> Q. And it doesn't recognize the Nome Consolidated Dredging Company as having any interest whatever, in the output of the claims, or the output of the dredges?
>
> A. No, sir.
>
> Q. Or the rental of the power plant?
>
> A. No, sir."

Why should the court permit the Alaska Mines Corporation in the face of the fraud so conclusively shown, to use and operate the property belonging to the Nome Consolidated Dredging Company that should be held for the creditors and stockholders thereof?

By permitting the said Alaska Mines Corporation to remain in the possession and use of said assets, the court is allowing the said Powell, Newton, Eisenlohr and Crane to profit by their fraudulent acts so clearly proven.

There is no serious dispute in the transcript and under the admissions of Powell and Schofield, the appellant must prevail on the final hearing of this action; therefore, the court should grant the relief prayed for by appointing a receiver to take possession and hold the property, pendente lite.

If the court has reached the conclusion that the making and giving of the mortgages and the foreclosure proceedings and the subsequent organization of the Nome Holding Company and the Alaska Mines Corporation, and the conveyances through them, were all a part and parcel of the fraudulent plan and scheme of the officers and directors of the Nome Consolidated Dredging Company, and that the Alaska Mines Corporation took the title thereto with notice of the fraudulent acts and doings of Powell and his associates, then in deciding the question of whether or not the court should grant the appellant's motion for a receiver, pendente lite, in considering the necessity for a receiver, we submit

the court should have no difficulty in finding from the transcript that the only assets of any value, now in the possession or under the control of the Alaska Mines Corporation are the very assets that were taken from the Nome Consolidated Dredging Company by the fraudulent acts of Powell and his associates; that the real value of said assets is not to exceed $200,000, consisting of dredges and a power plant and other incidental property, scattered over the tundra in the Nome mining district; that said property has been encumbered by two mortgages, aggregating $300,000. The court must also find it to be a fact as shown by the annual statement of the Alaska Mines Corporation, filed on the 1st day of August, 1917, that it had an indebtedness of $406,000. The court must also conclude from the record that the use of the power plant, running at its maximum capacity for a year or two, pending this litigation, will render the said power plant worthless; that the gold from the said Carnation Group Placer claim will have been mined out and appropriated by the Alaska Mines Corporation, under the control of the said schemers.

That if the appellant prevails at the final hearing of this case, and the court enters its decree, setting aside the said foreclosure proceedings, the appellant would then be entitled to the very relief now sought, which in all probability would be unobtainable by depreciation and dissipation of the assets now in the control of said parties. It is an equitable right that appellant is entitled to have said

assets preserved, pendente lite. The said Alaska Mines Corporation is in a position to further encumber the said assets by mortgages, liens, etc., and this condition should not be allowed to prevail. That by refusing to appoint a receiver, the lower court permitted Powell and his associates, under the guise of his corporate name, to have the use and benefit of the Nome Consolidated Dredging Company's property, pendente lite. Alaska has no statutory right of lis pendens against personal property. There is no other way of protecting appellant's rights there except by a receiver.

Seldom, if ever, will the court have an opportunity of reading a transcript that so thoroughly abounds in fraudulent acts of trusted officers and directors of a corporation, scheming and planning to annihilate the corporation and appropriate its assets to their own benefit, as is found in the transcript of this case. To permit them to prosper by the result of their fraudulent acts, would be in violation of every principle of equity and justice.

We submit the court should reverse the ruling of the Trial Court and enter an order, directing the lower court to grant the appellant's motion for a receiver, pendente lite, and thus preserve the property so that, at the final hearing, the appellant will not lose the beneficial result of the litigation.

Respectfully submitted,

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